United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-6149

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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P/S

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LUIS M. GRULLON, :

Plaintiff-Appellant, :

v. :

HENRY A. KISSINGER, Secretary of State of the United States, JULIO ARIAS, Director of the Visa Office in the Department of State of the United States, and EVELYN A. WYTHE, Vice Consul of the United States at Santo Domingo, Dominican Republic, : Docket No. 76 - 6149

Defendants-Appellees. :

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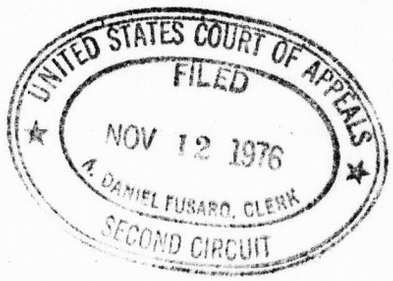

APPELLANT'S BRIEF

NOVEMBER, 1976

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Docket No. 76-6149

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether, under Fiallo v. Levi, 406 F. Supp. 162 (E.D.N.Y., 1975), probable jurisdiction noted, 96 Sup. Ct. 2622 (June 7, 1976), the District Court had jurisdiction to make a preliminary declaration of immigration status of plaintiff LUIS GRULLON's relationship to his natural father, MARTIN GRULLON, as distinguished from a review of the denial of an immigrant visa to MARTIN GRULLON.

2. Whether Section 101(b)(1)(D) of the Immigration and Nationality Act of 1952, 8 U.S.C. Sec. 1101(b)(1)(D) is unconstitutional in that it invidiously favors mothers over fathers of illegitimate children.

STATEMENT OF THE CASE

Plaintiff LUIS M. GRULLON ("Luis") is a legal permanent resident of the United States. Luis was born on March 10, 1946 to Ramona Torres and Martin Grullon who were not then, nor ever have been, married to each other (R. 11a).

On or about May 22, 1946, Martin declared the birth of Luis and recognized him as his natural son, R. 11a. Six years later, Martin married another woman, R. 11a.

In 1971, Luis requested the District Director of the Immigration & Naturalization Service to verify his status as a legal permanent resident on behalf of his father, Martin. This was done and in 1974 Martin applied at the American Consulate in Santo Domingo, Dominican Republic, for an immigrant visa.

The defendant, Vice Consul WYTHE, denied an immigrant visa to Martin on the sole ground that Luis was not Martin's legitimate son. No review of WYTHE's decision was made by the principal American consular officer at the Santo Domingo post, nor by the Visa Office of the State Department.

This litigation was commenced by the filing of a complaint, R. 1a - 7a. The defendants answered and interposed three defenses, R. 8a - 9a.

On defendants' motion for summary judgment, R. 21a, and on plaintiff's cross motion, R. 18a - 20a, Judge PRATT dismissed the action for want of jurisdiction, R. 24a - 29a.

Notice of appeal from such final decision was filed on September 17, 1976, R. 30a.

JURISDICTION

The appellate jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sec. 1291.

ARGUMENT

Point I. Decision in this case should be stayed pending the action of the Supreme Court in Fiallo v. Levi, 406 F. Supp. 162 (E.D.N.Y., 1975), probable jurisdiction noted, - - -U.S. - - - - (June 7, 1976).

The Supreme Court of the United States has before it an appeal from the decision of a three-judge district court in Fiallo, supra.

Speaking for the majority, Judge Moore held, at 165:

> Subject matter jurisdiction is conferred on this Court by section 279 of the Act, Title 8 U.S.C. Sec. 1329.
>
> (1) A threshold question is presented with regard to Fiallo's standing to maintain this action. The administrative decision on which Fiallo bases this suit is the denial of his petition by the United States Consul at Santo Domingo. Decisions of consuls granting or denying a visa have been held to be immune from judicial review. See, e. g., Loza-Bedoya v. INS, 410 F.2d 343 (9th Cir. 1969). We note, however, that the petition in question here did not constitute an application for a visa, but was a preliminary declaration of immigrant status. We will not extend consular nonreviewability, insofar as that rule has been recognized, beyond the actual grant or denial of a visa. This is predicated upon our reluctance to insulate entirely the actions of any public official from judicial scrutiny, and thereby foreclose a group of plaintiffs from seeking relief in the courts. Plaintiff Fiallo, therefore, is not barred from beinging this action.

One of the Fiallo cases (Trevor & Arthur Nilson) involved precisely the factual situation in the case at bar. The three-judge court held that it had jurisdiction to rule

on the merits of the claim. On this point there was no dissent.

Thus, the question that confronts this Court is whether it should declare itself in agreement with the unanimous holding under Section 279 of the Immigration & Nationality Act of the Fiallo court as to jurisdiction. In the case at bar, Judge Pratt ruled otherwise.

On this appeal the principle of the preservation of judicial resources should prevail and a decision should be deferred until after the Supreme Court has spoken in Fiallo. As formulated by the Solicitor General in his recently filed brief in Fiallo, the question there presented to the Supreme Court is this:

> Whether Sections 101(b)(1)(D) and 101(b)(2) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1101(b)(1)(D) and 1101(b)(2), violate due process of law by excluding the relationship between an illegitimate child and his or her natural father from the immigration preferences accorded by the Act to the "child" or "parent" of a United States citizen or lawful permanent resident alien.

Point II. The District Court erred in refusing to review the defendants' action pursuant to the Administrative Procedure Act.

The Administrative Procedure Act does not preclude judicial review of defendants' actions, because the Regulations of the Department of State specifically state that jurisdiction to make rulings concerning an interpretation of law is vested in the Department of State, 22 C.F.R. 42.130(c), last sentence. Thus, there was no unfettered, unlimited discretion vested in the defendant Consular officer to make a ruling that as

a matter of law, Luis is not Martin's legitimated son within the meaning of Law 985 of the Dominican Republic and of Sec. 101(b)(1)(c) of the Immigration and Nationality Act of 1952.

Under the Regulations, the review of the Vice Consul Wythe's ruling should have been made in the first instance by "the principal Consular Officer at the post", 22 C.F.R. 42.130(b). Thereafter, review of the questions of law involved should have been made by the defendant JULIO ARIAS, 22 C.F.R. 42.130(c).

None of these acts were performed by the defendants. Thus, the least relief which the District Court should have granted was that provided by 5 U.S.C. Sec. 706(1): compel agency action unlawfully withheld or unreasonably delayed.

Point III. The immigration statute that discriminates between natural fathers and natural mothers of illegitimate children is unconstitutional.

Appellant adopts, for the purposes of this brief, Judge Weinstein's excellent dissenting opinion in Fiallo, at 168.

Point IV. Defendant Wythe has not made her interpretation of Dominican law based on a State Department opinion.

The defendant Vice Consul WYTHE has made a ruling of law, R.24a, for which no basis can be found in a State Department opinion. The Regulations require that such an opinion be rendered before an immigrant visa may be refused, 22 C.F.R. 42.130(c). The defendants do not claim that such an opinion was even rendered or was sought by WYTHE.

Thus, there has been no facially bona fide determination by WYTHE that would pass the Kleindienst v. Mandel test, 408 U.S. 753,770 (1972). Such a determination must be made by one who is versed in both American and Dominican law. Since WYTHE is not a lawyer, she could not have made a bona fide determination of this sort.

Vice Consul WYTHE has purported to act pursuant to Sec. 221(g) of the Immigration and Nationality Act. That section gave her power to use her discretion, not to abuse it. Wythe abused her discretionary powers when she made a ruling of law without complying with the Regulation. That is the precise act that should be set aside as arbitrary, capricious and short of the statutory command.

CONCLUSION

For the foregoing reasons, decision in this case should be stayed pending the outcome of Fiallo. In the alternative, the judgment of the District Court should be reversed and the cause remanded for consideration on the merits.

Respectfully submitted,

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November, 1976

STATUTES AND REGULATIONS INVOLVED

Immigration and Nationality Act of 1952, 8 U.S.C.

Sec. 101(b)(1). The term "child" means an unmarried person under twenty-one years of age who is--****

(D) an illegitimate child, by, through whom, or on whose behalf a status, privilege, or benefit is sought by virtue of the relationship of the child to its natural mother;****

Sec. 221(g). No visa or other documentation shall be issued to an alien if (1) it appears to the consular officer, from statements in the application, or in the papers submitted therewith, that such alien is ineligible to receive a visa or such other documentation under section 1182 of this title, or any other provision of law, (2) the application fails to comply with the provisions of this chapter, or the regulations issued thereunder, or (3) the consular officer knows or has reason to believe that such alien is ineligible to receive a visa or such other documentation under section 1182 of this title, or any other provision of law:****

Sec. 279. The district courts of the United States shall have jurisdiction of all causes, civil and criminal, arising under any of the provisions of this subchapter. It shall be the duty of the United States attorney of the proper district to prosecute every such suit when brought by the United States.***

Administrative Procedure Act, 5 U.S.C.

Sec. 706. Scope of review. To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;***

22 C.F.R. Sec. 42.130. Procedure in refusing visas.

(a) Refusal procedure. A consular officer shall not refuse an immigrant visa until Form FS-510 is executed by the applicant. When an immigrant visa is refused, an appropriate record shall be made in duplicate on a form prescribed by the Department, which shall be signed and dated by the consular officer. The applicant shall be informed of the provision of law, or regulation issued thereunder, on which the refusal is based, and of any statutory provisions under which administrative relief is available.***

(b) Review of refusals at consular offices. If the ground of ineligibility upon which the visa was refused cannot be overcome by the presentation of additional evidence, the principal consular officer at a post, or an alternate whom he may specifically designate, shall review the case of each applicant who has been refused a visa and shall record his decision over his signature and the date on a form prescribed by the Department. If the grounds of ineligibility may be overcome by the presentation of additional evidence, and if the applicant has indicated that he intends to obtain such evidence, a review of the refusal may be deferred for a period not to exceed 120 days. If the principal consular officer, or his alternate, does not concur in the refusal, he shall (1) refer the case to the Department for an advisory opinion, or (2) assume responsibility for the case himself.

(c) Review of refusals by the Department. The Department may request a consular officer in an individual case or in specified classes of cases to submit a report if an immigrant visa has been refused. The Department will review such reports and may furnish an advisory opinion to the consular officer for his assistance in giving further consideration to such cases. If upon the receipt of the Department's advisory opinion, the consular officer contemplates taking action contrary to the advisory opinion, the case shall be resubmitted to the Department with an explanation of the proposed action. Rulings of the Department concerning an interpretation of law, as distinguished from an application of the law to the facts, shall be binding upon consular officers.

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Defendants-Appellees. :

- -X

STATE OF NEW YORK)
) SS.:
COUNTY OF NEW YORK)

RICHARD L. TSCHUDY, being duly sworn, deposes and says:

1. I am a citizen of the United States and over 21 years of age.

2. On November 11, 1976 I have mailed two copies of appellant's brief and one copy of appendix to appellant's brief by certified mail, receipt requested, to the attorney of record for the appellees-defendants, to wit:

DAVID G. TRAGER, Esq.
United States Attorney for the
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Richard L. Tschudy
RICHARD L. TSCHUDY

Subscribed and sworn to before me this 11th day of November, 1976

PABLO E. POLASTRI
Notary Public State of New York
No. 41-4628877
Qualified in Queens County
Certificate filed in New York County
Commission Expires March 30, 1978